1952.

File No. O. Constitution 52 pt. I

Legal Department.

A BRANCH

Subject:—

Opinions given under the Constitution of India.

[For subsequent pps. pl. see pt. II]

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File No. O. constitution/52 pt. I

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C O N T E N T S.

Legal Department Vol. No. O.Constitution/1952-I.

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6.	O.No.1014/22-1-52.	Re: Increase in the taxes by the Municipality of all the properties including the M. & S.M. Railway Buildings in the Municipal Area due to general revision of annual letting value. Question whether in view of ~~xx~~ R.L.A's Opinion No.11480 dt. 20-7-51 the Madras Govt. view that the Rly. Administrations are not liable to pay tax at enhanced rates introduced after the 25th January 1950, is correct. Article 255 of the Constitution.	
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8.	R.I.No.1330/21-1-52. O.No.2536/16-2-52.	Re: Transfer, under the India and Hyderabad (Exchange of Enclaves) Order, 1950 of three villages forming part of the Gojendrayad Saranjam, from the Dharwar Distt. to the Raichur Distt. in the Hyderabad State. Refusal by the Hyderabad Govt. to recognise the saranjam rights of the Saranjamdors . Question whether the matter should be referred to the Government of India Art. 294(a) of the Constitution.	
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10.	R.I.No.23473/14-11-51 O.No.2742/19-2-52.	Re: Construction and maintainance of a separate ward for yellow fever patients at Arthur Road Hospital, which may come to Bombay First from the West as the Bombay Air Port as well as Bombay Sea-Port have been declared as the First Air Port of entry for aerial traffic and the first Port of entry for vessels respectively. Question regarding bearing the expenditure in respect of the ward. Question whether State Govt. can claim from Govt. of India. the full cost of maintaining the ward in question.	
11.	R.I.No.3796/21-2-52. O.No.3249/28-2-52.	Question whether applications from accused persons undergoing sentence requesting ~~xxxxx~~ suspension, remission etc. of their sentences should be treated as applications under Art. 161 of the Constitution merely because they are addressed to H.E. the Governor.	

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12.	R.I.No.3899/22-2-52.	G.L.E.D.No.CBC 1051/2914-J dt.18-2-52. Re: Backward classes. "Kokni"and "Kunbi" communities of Dangs district -classification of.	
13.	O.No.3369/29-2-52.	Question whether a teacher employed in a secondary school which receives grant-in-aid from the State Govt. is holding an office of profit under the Government within the meaning of Article 191(1)(a) of the Constitution of India.	
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16.	R.I.No.4873/10-3-52 O.No.4343/20-3-52.	Re: Indian Nationality: Service Personnel. Articles 5 and 8 of the Constitution.	
17.	R.I.No.4119/26-2-52 O.No.5244/8-4-52.	Question whether the subjects of Portuguese and French possessions in India can now be denied admission to Government Medical Colleges in this State on the ground of domicile or citizenship or whether they should be held to be eligible for admission to these colleges on par with Indian Citizens from this State.	
18.	O.No.320-Conf1/ 2-4-52.	Re: Framing of charges by the Enquiry Officer in the departmental enquiry. Question whether, in spite of the Enquiry Officer's report that the first charge was not proved and that the second charge was partially proved, the statement made by Govt. in the show cause notice to be issued under article 311(2) of the Constitution, that both the charges are proved, would involve any material defect in the proceedings.	

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19.	O.No.4682/27-3-52.	Question whether the Commissioner of Police, Bombay, is a Magistrate for the purposes of Article 22 of the Constitution of India.	
20.	R.I.No.6805/8-4-52. O.No.5833/18-4-52.	Re: Proposal of the State Transport Corporation to issue debentures of the value of one crore of rupees repayable in ten years. Each debenture is to be of the value of Rs.10000/- and interest payable thereon is to be 4½% per annum. Inclination of the Insurance Association to purchase such debentures if the Govt. gives guarantee as to the repayment of the principal and the interest. Question whether under the Constitution of India the Govt. has such powers to guarantee repayment of debentures. Road Transport Corporations Act, 1950, Secs. 22 and 25. Article 293 of the Constitution.	
21.	O.No.5473/12-4-52.	Re:Offer of a donation to Govt. by Sir.Mahomed Yusuf Ismail for the promotion of higher education of mahomedan youths by starting a mahomedan college on the condition that preference should be given to Mahomedan students. Acceptance of the donation by Govt. upon trust to devote the same in the promotion of higher education of mahomedan youths. Difficulty experienced by Govt. in view of the provisions of the constitution, to carry out the obligations attached to the trust.	
22.	O.No.5484/12-4-52.	Question whether the withholding of payment of riot compensation to the Iranian nationals would be contrary to the provisions of Article 14 of the Constitution and whether the Govt's directions can be successfully challenged on that ground.	
23.	O.No.5554/14-4-52.	Re: Power of State Govt. to borrow and to give guarantee for the same limit to be fixed in respect of such power. Clauses (1) and (3) of Article 293 of the Constitution. Also Article 202(3) of the Constitution.	
24.	O.No.6739/30-4-52.	Re: Position of the Governor in regard to the institution of proceedings against him or the issue of any process against him. Personal immunity granted to under clause (1) of Article 361 of the Constitution, from legal action for any act done or purported to be done by him in the exercise of his powers and duties as laid down in the Constitution. Govt. of India Act, 1935. Sec.306(1) Code of Criminal Procedure, Sec.133.	

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25.	O.No.6122/22-4-52.	Re: Donation accepted by the Bhor State Darbar on the condition that prizes in books should be awarded every year to Brahmin girls who passes in the annual Examination from the Pali and Sidheshwar Schools. Difficulty experienced by Government after the merger of the State to carry out the objections attached to the donations in trust in view of the provisions of the Constitution. Article 15(3) of the Constitution,	
26.	R.I.No.3404/18-2-52. O.No.8518/21-5-52.	Re: Authorizing Superintendents in the Secretariat to sign routine orders on behalf of Govt. Circular issuing general orders in respect of - Rules of Business, Rule 12.	
27.		Re: Minutes of the meeting held at the office of the Secy. H.D. on 1-2-52 on the subject of canadian Assistance and the Goods Transport Scheme.	
28.	O.No.248-Confl. /7-3-52. (U.O.R. to Adv. General [Adv. General's Opinion No.4 dt.17-3-52) O.No.271-Confl./ 18-3-52.	Questions (1) Whether under the Road Transport Corporation Act, 1950, read with the Motor Vehicle Act, 1939, it would be open to the Corporation to take over the road transport services in the several parts of the State to the exclusion of other operators. In other words, whether it can have a monopoly to run the road transport service; (2) Whether in order to enable the Corporation to undertake such road transport service or to have a monopoly for the purpose of running such service, it would be legal to undertake legislation for the purpose. (3) If any such legislation is undertaken, whether it will be necessary to provide for compensatior to the present operators in respect of (a) the termination of their current permits, and (b) the loss of their business in consequence of being disentitled to the renewal of a permit to ply.	

A 1814/ 11-4-56

Office of the P.L.A.

Under article 332(1) of the Constitution the House or Houses of the Legislature of the Province shall exercise the powers and perform the duties conferred by the provisions of the Constitution on the House or Houses of the Legislature of a State only until the House or Houses of the Legislature of such a State has or have been duly constituted and summoned to meet for the first session under the provisions of the Constitution. As soon as, therefore, such summons for the first session of the Legislatures after the general election is issued, the existing respective House will cease to function and the members thereof, having also ceased to be members of the Legislature, will not be entitled to any salary with effect from such date. The presumption made in the Bombay Legislature Department not on pages 1-2 ante in this behalf is correct.

2. The second presumption that the members of both the Legislative Assembly and the Bombay Legislative Council will be entitled to their salary with effect from the date of such summons mentioned above is, however, not correct. Under Article 172(1) of the Constitution every Legislative Assembly of every State , unless sooner dissolved, shall continue for five years from the date appointed for its first meeting. Since the life of the Assembly itself commences from the date of its first meeting, the period of commencement of the membership of the persons elected thereto also must be deemed to begin to run with effect from the said date i.e. the date appointed for the first meeting of the Assembly. Consequently, they would be entitled to their salaries also with effect from the first day of the session and not from the date of issue of summons for the first meeting of the Assembly as is presumed by the Bombay Legislature Department.

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3. The case of persons elected to the Legislative Council of a State is however different. Under article 172(2), the Legislative Council of a State shall not be subject to dissolution, but as nearly as possible 1/3 of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law. Section 157 of the Representation of the People Act, 1951, provides that the term of office of a member of the Legislative Council of a State whose name is required to be notified in the Official Gazette under section 75 shall begin on the date of such notification. Under section 75 of the Act the results of the election to the Bombay Legislative Council held in pursuance of a notification issued under section 17 together with the names of persons nominated by the Governor under sub-clause (e) of clause (3) of article 171 have to be notified in the Official Gazette. The members of the new Bombay Legislative Council will, therefore, be entitled to their salary with effect from the publication of the notification referred to in section 157 of the Representation of the People Act, 1951.

Sd/- J.R.Dharandhar.
7.1
Remembrancer of Legal Affairs.

U.O. to B.L.D. No. 97, dated the 7th January 1952.

Initials
V.U.D./19.7
4c.

Legal Department.

The Prisons Act, 1894 (IX of 1894), the Prisoners Act, 1900 (III of 1900), the Identification of Prisoners Act, 1920 (XXXIII of 1920) and the Identification of Prisoners (Bombay Second Amendment) Act, 1935 (Bom. XXI of 1935) which extend to the whole of the Province of Bombay also extend to the two areas mentioned in para 2 of the S.D. letter dated 3rd May 1951 at p. 1 ante, which were formerly called the partially excluded areas.

2. Act No. V of 1893 is not in force as it has been repealed by the Prisoners Act, 1900 (III of 1900).

3. The Colonial Prisoners Removal Act, 1884 passed by the British Parliament applied to this Province and therefore to the partially excluded areas in question. This Act has been kept in force in India by the India (Consequential Provisions) Act, 1949 also passed by the British Parliament.

4. The Identification of Prisoners (Bom. Amendment) Act, 1922 (Bom. XI of 1922) extends only to Greater Bombay and therefore the question of its application to any partially excluded area does not arise.

5. The Identification of Prisoners (Bombay Amendment) Act, 1935 (Bom. IV of 1935) substituted a revised section for section 4 of the Principal Act i.e. the Identification of Prisoners Act, 1920 (XXIII of 1920). But this section 4 substituted by Bom. IV of 1935 has now been replaced by another revised section 4 by the Identification of Prisoners (Bombay Amendment) Act, 1948 (Bom. XV of 1948). Bom. IV of 1935 has therefore in effect been repealed and is no longer in force. As regards Bom. XV of 1948 as pointed out in para 2 of Home Department

note .....

note dated 17th December 1951 at page 51 ante, the Act has already been applied to the partially excluded areas by Government Notification Home Department (Pol.) No. SD- 671/ 8132 dated 7th July 1948.

Sd/- J.R.Dhurandhar.
22.1
Additional Secretary to Government.

U.R. to H.D. No. 1093, dated the 23rd January 1952.

V.N.D./19.7
4c.

Legal Department.

Shri A.A.A. Fyzee was appointed as a member of the Bombay Public Service Commission on 1st August 1947. Prior to his appointment as Member of the Commission, he was in permanent non-pensionable Government service as Principal of the Government Law College at Bombay. He has appointed as India's Ambassador in Egypt from 11th August 1949 for about two years. Shri Fyzee has now come back and resumed his duty as Member of the Commission. During the period of his deputation, his lien on the post of Member of the Commission was kept. His term as Member of the Bombay Public Service Commission is due to expire on 31st July 1952. He is expected to be appointed as a Member of the Union Public Service Commission from 15th March 1952. The question raised for consideration is whether article 319(d) of the Constitution precludes the retention of Shri Fyzee's lien on the post of Principal of the Government Law College on his ceasing to be a member of the Bombay Public Service Commission and taking up appointment as a Member of the Union Public Service Commission, till he actually retires from Government service on reaching the age of superannuation.

2. "Lien" as defined in rule 9(31) of the Bombay Civil Service Rules means the title of a Government servant to hold substantively either immediately or on the termination of a period or periods of absence, a permanent post, including a tenure post, to which he has been appointed substantively. Rule 18A lays down a general principle that a Government servant on substantive appointment to any permanent post acquires a lien on that post and ceases to hold any lien previously acquired on any other post. When Shri Fyzee was appointed a Member of the Commission he acquired a lien on that post and that lien was retained during the period of his deputation in Egypt. Under section 265(3)(c) of the Government of India Act, 1935, it would have been possible to allow Shri Fyzee to continue in the post of

Principal of the Government Law College, with approval of the Governor, after the expiry of his term as a Member of the Commission. But there is no corresponding provision in the Constitution and the provisions of article 319(d) of the Constitution precludes Shri Fyzee to continue in the post of the Principal after he ceases to be a Member of the Bombay Public Service Commission. It is true that the proviso to article 318 lays down that the conditions of service of a member of a Public Service Commission shall not be varied to his disadvantage after his appointment. But the proviso applies to any regulations to be made under that article. In view of the specific provisions contained in article 319(d), it is not legally possible after 26th January 1950 for Shri Fyzee to hold the post of Principal after he ceases to be a Member of the Commission and, therefore, by operation of law he has lost his lien or title to hold that post with effect from the said date.

Sd/- J.R.Dhurandhar.
21.1
Additional Secretary to Government.

U.R. to P. & S.D. No. 340 dated, 12th January 1952.

V.M.D./[illegible] 21.7
4c.

9

Office of the R.L.A.

Article 25 of the Constitution provides that subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. It is indeed curious that in a Country where religious sentiments hold sway over people's minds and tin which almost all the religions of the World are represented, the fundamental right of propagation of the religion should ealo have been granted. The Universal Declaration of Human Rights concedes to each individual the right to freedom of religion including the freedom to change his religion and freedom either alone or in community with others and in public or private to manifest his religion or belief in teaching, practising, worshipping and observance. It will thus be seen that the Universal Declaration does not concede the riht to an individual of propagating his religion. Propagation can seldom be practised without impinging upon the sentiments of the rival religions. In this particular case calling the Association the Parsi Catholic Association and throwing open its membership to Parsis who have a definite propensity to the Catholic faith and having one of its objects as making contacts with such Parsis as are favourably inclined towards the Catholic Faith and to aid them in their search for the True Light is bound to iritate the Parsis. The inquiry under the Article is whether such iritation can make it a question of public order. It is only then that action can be taken under an appropriate law relating to public order such as the Indian Penal Code. The material now placed before Government does not suggest that public order is in any way likely to be affected as between the Parsis and the members of the Association or those who

are sponsering the Association. Government may, therefore, say in reply that no action seems to be called for upon the facts placed before them. At the same time I would suggest that an opportunity may be taken of informally conveying to the Archbishop that proselytization of this kind is not likely to be conducive to harmony between different religious communities in the State of Bombay and eventually may recoil upon the Christians themselves and may conceivably create problems of public order when Government would be obliged to step in.

Sd/- P.H.Lad.
23.1
Remembrancer of Legal Affairs.

V.H.D./21.7
40.

Office of the R.L.A.

In his letter No. 584 dated 16th August 1951, the President, Gadag, Betgeri Borough Municipality States that the increase in the amount of the tax is due to general revision of annual letting value of all the properties including the Railway buildings in the Municipal area. The Municipality has neither imposed any new tax nor is there any enhancement in the assessable rate. The M. & S.M. Rly., however, appears to contend that under Art. 285 of the Constitution, the Railway administration is not liable to pay anything more than what they were liable to pay before 25th January 1950. In support of this contention, it appears to rely upon the view expressed by the Madras Government in its Government Order No. 1280 dated 26th June 1951 in which it is held that the Railway administrations are not liable to pay tax at enhanced rates introduced after the 25th January 1950. R.L.A. is requested to advise whether in view of R.L.A's opinion No. 11430 dated 20th July 1951 the Madras Government view is correct.

A similar question was considered when Chatkopar-Kirol enhanced the house-tax from $8\frac{3}{4}$ p.c. to $12\frac{1}{2}$ p.c. and the General Manager, G.I.P. Rly. contended that the Railway was not liable to pay the tax at a rate higher than that which was in existence in 1937. Attention of the Local Self Government and Public Health Department was invited to Advocate General's opinion No. 21 dated 20th June 1940 wherein he held that the municiplaities can increase the existing rate. As this view was different from the view taken by the Government of India, the Local Self Government and Public Health Department was requested to decide which view it should accept. (See R.L.A's opinion No. 3473 dated 13.3.50) Provisions of Article 285 of the Constitution are analogous to those of section 154 of the Government of India Act, 1935. Clause (2) of Article 285 of the Constitution provides

that nothing in clause (1) shall until Parliament by law other-wise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State. The words "any tax" and "that tax" in Article 285(2) should be understood to have reference not to the quantum or rate of the tax but to the nature or form of it (See para 2 of Adv. General's opinion No. 21dt. 20.6.1940). In view of Adv. General's opinion No. 21 dt. 20.6.40, which has been followed by R.L.A. in his opinion No. 3473 dated 28th 13th March 1950 and R.L.A's opinion No. 11436 dated 20th July 1951, the Madras Government view should not be accepted until the point is finally decided by a competent Court or by Parliamentary legislation.

Sd/- P.N.Lad.
22.1
Remembrancer of Legal Affairs.

U.O. to L.S.G. & P.H.D. No. 1014, dated the 22nd January 1952.

V.H.D./21.7
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17

Legal Department.

Article IV (b) of the agreement dated 23rd January 1950 entered into between the Governor General of India and the Nizam of Hyderabad provides that all rights, liabilities and obligations, whether arising out of a contract or otherwise of the Province of Bombay in relation to the Bombay enclaves in Hyderabad shall be the rights, liabilities and obligations of the Government of Hyderabad. The Saranjam villages are no doubt situate in such enclaves. But the article is similar in terms to Article 294(b) of the Constitution. That article was relied upon in the U.P. Zamindari Abolition Case and the Pargana and Kulkarni Watan Abolition Case. In both cases, the Allahabad as well as the Bombay High Court have held that it does not mean that the rights and obligations referred to therein are to continue for all time and cannot be curtailed or extinguished by a competent legislature. (See Suryapal vs. U.P. 49 A.L.J. 363 at page 387, Bombay High Court C.A. No. 1204 of 1951). Article IV (b) of the agreement with the Nizam cannot be relied upon as guaranteeing the continuance of the Saranjam and the Hyderabad Legislature was competent to abolish the same. It may be noted that both the Hyderabad (Abolition of Jagirs) Regulation, 1358 F and the Hyderabad Jagirs (Commutation) Regulation, 1359 F, have been included in the Ninth Schedule to the Constitution and if the Hyderabad Government purports to act under them, no objection can be taken to their validity. If the Saranjamdar has any grievance, it is open to him to challenge the action of the Hyderabad Government in a proper court of law.

Sd/- J.R.Dhurandhar.
14.2
Additional Secretary to Government.

U.P. to P. & S.D. No. 2536, dated the 16th February 1952.

V.H.D./21.7
40.

OFFICE OF THE R.L.A.

Rights of detenu - Refusal to allow presentation of nomination in person.

Constitution of India Part III.

In his opinion No. 8439, dated the 26th July 1949, the R.L.A. held that a nomination paper for election to a village panchayat has to be delivered by the Candidate to the Returning Officer in person and that the mode of delivery through an agency is excluded. H.D. considers that it would not be possible to allow detenus to go to Returning Officers even in custody for the purpose of delivery of nomination papers. The Local Self Government has, therefore, requested R.L.A. to advise whether this absence of facility to a detenu to present his nomination paper in person can be said to be a denial of any fundamental right guaranteed by the Constitution.

2. It is not clear from the note of the L.S.G. & P.H.D. what fundamental right conferred upon a citizen of India is contravened if a detenu is debarred from presenting his nomination for an election to a village panchayat as a result of the Rules which require personal presentation. Right to contest an election to the village panchayat is not a fundamental right guaranteed by any of the Articles in Part III of the Constitution. The disability to contest the elections arises from the fact of the detenu(s detention and if as a consequence of such detention any of the fundamental rights are infringed, no complaint can be made. (Compare the observations at pp. 101; 106-107 and pp. 304-305 in A.K. Gopalan vs. State, 1950 S.C.R. 88).

Sd/- P.H.Lad.
19.2
Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.H.D. No. 2715, dated the 19th February 1952.

V.H.D./21.7
Lo.

OFFICE OF THE R.L.A.

Entry 23 in List I in the Seventh Schedule to the Constitution is "Port quarantine, including hospitals connected therewith." Although the point is not free from doubt, it is possible to construe "port quarantine" as including air port quarantine and so construed any hospitals connected with sea port quarantine as well as air port quarantine would fall entirely within Entry 23 in List I. If, therefore, the proposed ward of 30 beds is intended to be constructed and maintained only for persons affected by yellow fever arriving from abroad at the sea or air port in Bombay, the construction and maintenance of the ward would be a function to which the executive power of the Union extends and as such in virtue of the previsions of Article 258(3) of the Constitution, it will be open to this Government to ask the Government of India to bear full costs in respect of these beds. If, however, the intention is to utilise the wards in question also for persons residing in the city in case they are affected by an outbreak of the yellow fever, then the matter will also fall under entry 6 in the State List in the Seventh Schedule to the Constitution; and in view of the provisions of clauses (g) and (gg) of section 61 of the Bombay Municipal Corporation Act, the Bombay Municipal Corporation will have to share the costs with the Government of India and the proportion in which the costs should be shared would be a matter of mutual adjustment between the State Government in consultation with the Corporation and the Government of India.

Sd/- P.H.Lad.
19.2
Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.H.D. No. 2742, dated the 19th February 1952.

V.M.D./21.7
40.

Office of the R.L.A.

Remission etc. of sentence

Constitution of India

Article 161

R.L.A's opinion No. 14330 dt. 12.10.1950.

As pointed out by the R.L.A. in his opinion No. 14330, dated the 12th October 1950, in matters of suspension, remission and commutation of sentences the power conferred on the Governor by Article 161 is of the nature of a prerogative and is in addition to the power given to the State Government under the Code of Criminal Procedure. The power is, therefore, concurrent and co-extensive; and the question whether the petitioner desires that his case should be treated under the Criminal Procedure Code or under the Constitution will have to be decided, as pointed out by Secretary, Home Department by reference to the wording of the petition and the expressed or implied intention of the prisoner. However, in gathering this intention, the fact that the petition is addressed to His Excellency cannot be ignored. A practical course would be to incorporate instructions in the Jail Manual that in all cases Government may be moved in the first instance, and after Government pass the orders the prisoner may, if so advised, petition the His Excellency to exercise his powers under the Constitution. That will give the prisoner the benefit of all the available appeals for remission etc.

Sd/- P.N.Lad.
23.2
Remembrancer of Legal Affairs.

U.R. to H.D., No. 3249, dated the 23th February 1952.

V.H.D./21.7
40.

Office of the P.L.A.

Section 7 of the Representation of the People Act, 1951, referred to by the Collector, Poona, on page 1 ante has no application in this case. The question that falls to be considered is whether a teacher employed in a secondary school which receives grant-in-aid from the State Government is holding an office of profit under the Government within the meaning of Article 191(1)(a) of the Constitution of India. The answer to the question is in the negative (see L.D. opinion No. 2761, dated 13.2.1951 - copy attached).

Sd/- P.M.Lad.
29.2

Remembrancer of Legal Affairs.

U.R. to P. & S.D., No. 3369, dated the 29th February 1952.

V.M.D/21.7
&c.

Office of the R.L.A.

Article 362 of the Constitution would not strictly be applicable to the case of the Jahagirdars. It is, no doubt, true that article 13 does not in terms abolish the titles which were already in use before the commencement of the Constitution, and that the words "no title .... shall be conferred" are capable of construction that titles shall not be hereafter confirmed. However, the spirit of that article does require, as can be gathered from its marginal note, that Government should not give official recognition to titles; for, in spirt there is hardly any distinction between actually conferring a title and continuing it by recognition. A title such as that of 'Raja' is likely by such recognization to be treated as hereditary and that is precisely the result which the Constitution seeks to avoid. The Government of Bombay would, therefore, be justified in acting upon the instructions contained in the Government of India, Ministry of Home Affairs Circular Memorandum No. F. 51/30/48-Public (I) dated the 31st December 1948.

2. As regards the question whether these titles should be continued because of the necessity of respecting the arrangements made by the Kolhapur State, it must be observed that originally these Jahagirdars were treated merely as Jahagirdars and not as Ruling Princes. It does seem, however, that after the conferment of the title of 'Raja' hon them by the Maharaja of Kolhapur on 1.6.47, that title was thereafter commonly used not only by the Kolhapur Darbar but also by the Bombay authorities and the Government of India in addressing these Jahagirdars. The Jahgirdars are now under the supremacy of the Government of Bombay. The Constitution must naturally over-ride all arrangements which are in conflict with its spirit and which it does not

expressly ....

expressly sanction. However, having regard to the fact that these titles were once recognized by the Government of Bombay it may perhaps be a satisfactory solution of the problem to continue that recognition as a matter of mere courtesy for the present Jahagirdars only.

....

Sd/- P.M.Lad.
7.3
Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 4037, dated the 17th March 1952.

V.M.D./21.7
4c.

Office of the R.L.A.

A copy of the judgment in question is enclosed herewith. That judgment interprets the provisions of the Constitution before it was amended, and that too in respect of Article 15. It has no bearing on Article 16 which sis the relevant Article for the purposes of the present case and also on the issues involved in this case. Article 16(1) lays down the general rule that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. This clause, therefore, makes selection on merit as the dominant guiding principle, since through such selection alone can equality of opportunity be ordinarily achieved. Clause (4) of the Article empowers the State to make provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The underlying principle of this clause is to redress the lack of adequate representation to a particular backward class. Attention is invited to the words "services under the State" which seem to contemplate the services as a whole and not any particular class of services. In other words, the intention of the clause is not that in every service the inadequacy of representation must be redressed by reservation. It would, therefore, be a matter of policy for Government to decide whether depending upon the nature of the service the general principle of equality of opportunity in clause (1) should be modified by reservation of representation made under clause (4).

Sd/- P.N.Lal.

10.3.
Remembrancer of Legal Affairs.

C.S.
3768/10.3.52

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No. 4343.
Office of the
Remembrancer of Legal Affairs,
Bombay Castle (Bombay No. 1), 20th March 1952.

To

H.Q. Bombay Area,
Colaba, Bombay 5.

Subject:- Indian Nationality - Service Personnel.

With reference to your letter No. 21633 GDI, dated the 4th March 1952, on the above subject, I have the honour to enclose my opinion in the matter.

Sd/- V.M.Lad.
19.3
Remembrancer of Legal Affairs.

Enclosure : Opinion.

V.M.D./21.7
40.

Office of the R.L.A.

From the facts reported by the Head Quarters, it is clear that Ona Shiv Prabhad is not an Indian Citizen within the meaning of Art. 5 of the Constitution. It is also not clear whether he has taken advantage of Art. 8 of Constitution and got himself registered as a citizen of India by the diplomatic or consular representative of India in the Fiji Islands. Presumably being in India at the relevant date, he has not done so. In that case he cannot be considered to be an Indian Citizen; and may be discharged from the Army if non-Indians are not allowed to serve in the Army.

Sd/- P.M.Lad.
19.3
Remembrancer of Legal Affairs.

V.M.D./21.7
&c.

Office of the R.L.A.

As pointed out in para 3 of Government Resolution (Political and Services Department) No. 7095/46, dated the 20th May 1950 (page 43 of file No. 5956/33 VIII), there is now no constitutional ban to the appointment of non-citizens in India to services and posts under Government. Similarly, there is no constitutional ban on the admission of subjects of Portuguese and French territories adjacent to India to any educational institutions maintained by the State or receiving aid out of State funds. There is, therefore, no legal objection to making the subjects of Portuguese and French territories in India eligible for admission to Government Medical Colleges in this State on par with the citizens from this State. The question whether these subjects should be held eligible for such admission is a question of policy to be decided by Government. It may be noted that the prohibition of discrimination on the ground of place of brity etc. contained in article 15 of the Constitution is applicable only in the case of citizens and would not apply in the case of persons who are not citizens.

Sd/- P.M.Lad.
5.4.
Remembrancer of Legal Affairs.

U.O. to L.S.G P. H.D. (Thro P. (S).D.) No. 5244, dated the 8th April 1952.

V.M.D./21.7
&c.

Office of the R.L.A.

It appears that two charges were framed against Shri D.B.Patki in the departmental enquiry and the Enquiry Officer submitted his report to Government. Government agreed with the Enquiry Officer that the first charge was not proved and that the second charge was partially proved. However, in the notice given to Shri Patki by Government to show cause under article 311(2) of the Constitution, it was stated that Government had come to the conclusion that the charges framed against him had been proved. In his reply Shri Patki has pointed out that the Enquiry Officer held that the first charge was not proved and that the second charge was partially proved and it was not known how Government held that both the charges were proved. Government has decided to remove him fromservice on the basis of the partially proved charge No. 2. The question raised for the consideration of R.L.A. is whether the statement made by Government in the show cause notice that both the charges are proved would involve any material defect in the proceedings. In High Commissioner v. Lal (A.I.R. 1948 Privy Council 121) under the provision of the Government of India Act, 1935, corresponding to article 311 (2) of the Constitution of India, the observations of the Privy Council are in to the following effect:

"No action is proposed within the meaning of this sub-section until a definite conclusion has been come to on the charges and the actual punishment to follow has been provisionally determined. Prior to that stage the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which the present sub-section makes the provision. Their Lordships see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an enquiry, it would not be reasonable that he should ask for a repetition of that stage if duly carried out but that would not exhaust his statutory right and he would still be entitled to represent against the punishment proposed as a result of the findings of the enquiry."

The finding of the enquiry in the present case on the first charge was in the negative and on the second charge partially proved. The punishpunishment proposed by Government will have to be with reference to the partially proved charge. In the notice given by Government it is stated that both the charges are proved. Consequently, the punishment proposed by Government would be deemed to be with reference to both the charges as proved. There would, therefore, be a material irregularity if the punishment proposed by Government is imposed on the basis that both the charges are proved. Government should, therefore, give a fresh notice to Shri Patki to the effect that the first charge was not proved and the second charge was partially proved. in view of which Government proposes to impose the punishment of removal and he was called upon to show cause why the punishment should not be imposed on him.

Sd/ P.N.Lad.
1.4
Remembrancer of Legal Affairs.

U.O. to P. & S.D. No. 320-Coufl., dated the 2nd April 1952.

V.N.D./21.7
4c.

41

Office of the R.L.A.

In his telegram the Secretary to the Legislative Assembly, Lucknow, wants to know whether the Commissioner of Police, Bombay, is a Magistrate for the purposes of Article 22 of the Constitution of India.

2. Article 22(2), which is apparently in view, reads as follows:-

> "Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."

3. The word "magistrate" has not been defined in the Constitution but has been defined in clause (32) of the General Clauses Act, 1897, which applies to the interpretation of the Constitution under Article 367. According to that definition "magistrate" shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force. The Commissioner of Police, Bombay has been appointed a Presidency Magistrate under section 18 of the Code of Criminal Procedure read with the proviso to section 1(2) of that Code. He has also been given the powers under section 144 of the Code. Under section 13 of the Bombay Police Act, 1951, he exercises powers under certain specified sections, namely, 94, 96, 97,98, 105, 523, 524 and 526 of the Code of Criminal Procedure. In a sense, therefore, the Commissioner of Police can be said to be a magistrate because he exercises some of the powers of the magistrate under the Code of Criminal Procedure.

4. However, the words "court of a magistrate" used in clause (2) of Article 22 give a clue as to what kind of magistrate is contemplated by that Article.

The word "court" has not been defined in the Constitution, nor in the General Clauses Act. The word "court" has not been defined in any Act of the Legislature; but it may be presumed that an officer to be a court must be competent to make a judicial decision. "court" generally means a tribunal empowered to hear and determine issues between be parties. The words "court of the magistrate" used in clause (2) of Article 22 thus lead inevitably to the inference that the magistrate therein contemplated is a magistrate who can function as a court, in other words, who can function as a tribunal and come to a judicial decision. Although the Commissioner of Police has been appointed a Presidency Magistrate and exercises some of the powers under the Code of Criminal Procedure, he cannot be considered to be a magistrate of the kind contemplated by clause (2) of Article 22, since it cannot possibly be maintained that he is a court in the sense discussed above.

5. The answer to the question, therefore, is in the negative.

6. Upon inquiries made with the Commissioner of Police it appears that he endorsed the warrant for execution by his subordinates who arrested Shri Mistry and produced him before the Commissioner, whereupon the Commissioner directed that he should be produced before the Speaker as required by the warrant. In these proceedings the Commissioner was apparently not acting as a magistrate but as the Commissioner of Police

7. If H.D. so desires, it may be brought to the notice of the Secretary to the Legislative Assembly, Lucknow, that the Commissioner felt (1) that the arrested person was being sent by aeroplane to Lucknow ~~before a~~ and could therefore, have been produced at Lucknow before a magistrate within 24 hours; and that (2) the Legislative Assembly before whom the arrested person was to be

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produced could themselves be regarded as a court; and since each court had the powers of arrest, inquiry and punishment as claimed by them, they could also be treated as a magistrate for the purposes of Article 22(2) so that the arrested person could also have been produced within 24 hours before the Speaker of the Assembly.

Sd/- P.M.Lad.
27.3
Remembrancer of Legal Affairs.

U.R. to H.D. No. 4682, dated the 27th March 1952.

V.H.D./24.7
Lo.

47

R.I.No. 6835.
dt. 3.4.52.

Attention is invited to R.L.A's opinion No. 854 dt. 14.4.1952. In view of the provisions of article 293 of the Constitution it would be open to Govt. to give the proposed guarantee but in the absence of ak law making of charged on the consolidated fund of the state xf it would be subject to the vote of the Legislature.

Sd /- S.L.Chaudhari.
16.4

Sd/- P.N.Lal.
16.4
Remembrancer of Legal Affairs.

U.O.N. to F.D. No. 5833, dated 18.4.1952.

V.N.D./25.7
40.

Office of the R.L.A.

In January 1914 Sir (then Mr.) Mahomed Yusuf Ismail offered to Government a donation of Rupees 8 lakhs for the promotion of higher education of Mahomedan youths. In making his offer the donor, while leaving to H'E. the Governor full discretion as to particular objects to which his donation should be devoted, indicated a preference for the foundation of a mahomedan College which would be located in Bombay or Poona and affiliated to the Bombay University. The Governor-in-Council decided after a careful consideration of the whole question that the donation should be devoted towards the establishment of a first grade Government Arts College on a selected site at Andheri and that the College should be primarily for Mahomedans but students of other communities should also be admitted. This decision was conveyed to Sir Mahomed Yusuf by a letter dated 20th June 1919 and he was requested to inform Government whether he approves of the decision.

By his letter dated 9th July 1919 Sir Mahomed Yusuf conveyed to His Excellency, the Governor his grateful thanks for the decision but stated that he agreed to the proposal on the understanding that members of the Mahomedan community who may apply for admission will always be admitted into the institution in preference to applicants of every other community. The intention being that at some some future time when higher education spread amongst the Mahomedans, it may become a Muslim institution unless the accommodation provided is continuously increased to provide for students of other communities. Reply proposed in Government Resolution, Education Department No, 2928 dated 16th August 1919 shows that the understanding referred to above was confirmed as correct.

There is no doubt that Government accepted the donation upon trust to devote the same in the promotion of higher education of Mahomedan youths. In fact that is

the opinion expressed by the Advocate General in his opinion No. 11 dated 4th February 1918. In view of the provisions of the Constitution, it has become impossible for Government to carry out the obligations attached to the trust. It is therefore, advisable that Government may, after obtaining the consent of the Charity Commissioner apply to the Court ~~of~~ for directions. Unless Government proposes to treat muslims as socially and educationally backward class which is a matter of general policy. In view of what is stated in para 2 above this latter course may not be a permanent solution of the problem.

Under sections 55 and 56 of the Bombay Public Trusts Act, 1950, it may be possible for the Court to give directions and relieve Government of the obligations if it is of the opinion that having regard to the provisions of the Constitution of India it is a inexpedient tocarry out the same. However the chances are that the Court may hold that the constitutional disability applies only to Government and it is still possible to carry out the original object of the donor if the College is handed over to some other muslim Trustees who may be willing to take it over.

Having regard to the difficulties pointed out above it is for the Education Department to decide whether Government itself should approach the Court at this stage or whether it should be held up until someone else raises the point.

Sd/- P.F.Lad.
9.4
Remembrancer of Legal Affairs.

Ex U.S. to E.D. No. 5473 dated the 12th April 1952.

V.M.D./24.7
40.

Office of the R.L.A.

Withholding of riot compensation

Constitution of India

Article 14.

The question that is referred to R.L.A.is whether the withholding of payment of riot compensation to the Iranian nationals would be contrary to the provisions of Article 14 of the Constitution and whether the Government's directions can be successfully challenged on that ground.

2. Section 46A of the City of Bombay Police Act. 1902, which is now repealed and re-enacted as Section 53 of the Police Act, 1951, provided that "the Chief Presidency Magistrate shall discharge his functions funder sections 45 and 46 subject to any general or special orders of the State Government in his behalf." In view of these provisions it was lawful for Government to direct the with holding of the compensation awarded to any person and the direction issued by Government withholding payment of compensation to Iranian nationals would, therefore, be valid (cf. R.L.A's opinion No. 777-Confl. dated the 6th August 1951).

3. The question, however, is whether these directions would offend against Article 14 which guarantees equality before the law and equal protection of the laws to all persons within the territory of India. It is now well settled that the provisions of Article 14 apply to legislation as well as to executive action and it is held by the Supreme Court that even executive action or notifications must not infringe it (see State of West Bengal Vs. Anwar Ali, A.I.R. 1952 S.C. 75, per Patanjali Sastri C.J.). It is also equally well settled that though Article 14 guarantees equality, it does not prohibit classification though such classification is some degree likely to produce some inequality. The classification permissible, however, must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. In the present case the compensation awarded

to the nationals of Iran has been withheld pending similar recoveries from the Iranian Government. Iranians who are aliens form a well defined class and payment has been withheld not arbitrarily or without any substantial basis but on a ground (viz. recovery of similar compensation from the Government of Iran) which has a reasonable relation to the question of payment. However the point is not quite free from doubt; and if necessary, the advice of the Government of India, at whose instance payment is withheld, may be obtained, and in the meanwhile, status quo may be maintained until the matter is taken to a court of law.

Sd/- P.M.Lad.
10.4
Remembrancer of Legal Affiars.

T.C. to H.D., No. 5484, dated the 12th April 1952.

V.H.D./24.7
40.

Office of the R.B.A.

Clause (1) of article 293 of the Constitution of India provides that, subject to the provisions of the article, the executive power of a State extends to borrowing within the territory of India upon the security of the Consolidated Fund of the State within such limits, if any, as may from time to time be fixed by the Legislature of such State by law and to the giving of guarantees within such limits, if any, as may be so fixed. It will be apparent from the provisions of this clause that no law setting limits to the borrowing power of the State or to its power of giving guarantees is essential according to the strict letter of the Constitution. However, if no such law is passed, the executive power of the State to borrow and to give guarantees would except as provided in clause (3) of the article be unlimited and unchecked. The spirit of the article requires that a limit should be set for the time being which can of course be revised. It is therefore, a question of policy for Government to decide what limit should be put upon the aforesaid power of the State by enacting a law as contemplated by clause (1) of the Article.

2. As pointed out by the Advocate General in his opinion dated the 1st March 1949, any guarantee given by the State must be subject to the vote of the Legislature. If in a particular case the intention is that such guarantee should not be subject to the vote of the Legislature, it would be necessary to enact legislation under article 202(3) for making it charged on the Consolidated Fund of the State.

Sd/- P.M.Lal.
14.4
Remembrancer of Legal Affairs.

U.R. to F.D. No. 5554, dated the 14 th April 1952.

The position of the Governor in regard to the institution of proceedings against him or the issue of any process against him as laid down in the Constitution is different from the one which obtained under the Government of India Act, 1935. Under sub-section (2) of section 306 of the Government of India Act, 1935, no proceeding whatsoever could lie in, and no process whatsoever could issue from, any court in India against the Governor. Under clause (1) of Article 361 of the Constitution the Governor is granted personal immunity from legal action for any act done or purported to be done by him in the exercise of his powers and duties as laid down in the Constitution. Clause (2) of that Article gives the Governor immunity from criminal proceedings during his term of office, while clause (3) of the said Article gives him immunity from arrest and imprisonment during his term of office. Clause (4) of the Article, which is relevant in this connection, refers to the acts done by the Governor in his personal capacity. Under this clause civil proceedings can be instituted against the Governor during his term of office in any court in respect of any act done or purported to be done by him in his personal capacity, and if any such civil proceedings are instituted against him, he shall not be immune from any process requiring his personal appearance in the court in which such proceddings are instituted. Exemption from personal appearance in courts is no doubt a matter of procedure. Under sub-section (1) of section 133 of the Code of Criminal Procedure, such notification has to be issued and can be issued by the State Government exempting the Governor from personal appearance in any court. However, such exemption must necessarily be operative in respect of courts in a particular State, and a Governor will not thereby secure exemption from appearance in all courts

all over India wherever he may conceivably be sued.. Besides the language of sub-section (3) of section 133 makes it clear that exemption of this kind is a privilege. Privileges of Governor is a matter enumerated in List I of the Seventh Schedule to the Constitution (entry 75). Both from the point of view of securing exemption from personal appearance in all courts in India and also from the point of view of competency, it would, therefore, be desirable that the Central Government should be moved to make legislative provision for the purpose.

Sd/- P.N.Lal.
27.4
Remembrancer of Legal Affairs.

U.O. to H.D. No. 6739, dated the 30th April 1952.

V.H.D./24.7
4c.

OFFICE OF THE R.L.A.

Prizes for Brahmin girls
———
Constitution of India Article 15(3).
———

Fund at S.No. 5: According to the conditions of the Trust, prizes in books are to be awarded every year to the Brahmin girl student who passes in the annual examination from the Full and Middle-vernar Schools. The donation was accepted by the Dhar Darbar in 1929 and this Government as a successor to the merged State is bound by the conditions of the trust. However in view of the provisions of the Constitution contained in clause (3) of Article 15 no prizes can now be reserved for Brahmin girl students, and it has become impossible for Government to carry out the obligations attached to the trust. As stated by the A.L.A. in his opinion No. 5473, dated the 12th April 1952 under sections 55 and 56 of the Bombay Public Trusts Act, 1950 it is possible for the Court to give directions and relieve Government of the obligation if it is of opinion that having regard to the Constitution it is impossible to carry out the same. The directions of the Court may therefore have to be sought accordingly. However since the amount involved is too small it is for the E.D. to decide whether Government itself should approach the Court at this stage or wait until someone raises the point.

2. There would be no legal objection to utilise the funds at S. Nos. 7, 8 and 12 as proposed by the Director of Public Instruction in his endorsement dated the 15th August 1951.

Sd/- P.H.Lad.
21.4
Remembrancer of Legal Affairs.

U.R. to S.P. No. 6122, dated the 22nd April 1952.

V.H.D./24.7
40.

Legal Department.

In 1947 the Government of Bombay decided to nationalise the Road Transport services and the said decision was approved by the Bombay Legislature. In order to carry out that object certain provisions of the Motor Vehicles Act, 1939, were enacted by Bombay Act VII of 1947. The said Act inter alia purports to amend section 43, 44, 45, 47 and 53 and inserts new sections 44A and 57A. The Bombay State Road Transport Board was constituted by an executive order to carry out the above object. As pointed out in the judgment of the Bombay High Court in Civil Application No. 631 of 1951 that policy was abandoned. In the meantime, the Central Legislature passed the Road Transport Corporation Act, 1948. The Bombay Road Transport Corporation was established under the said Act. The validity of the said Act was challenged and the Bombay High Court held that the said Act contained provisions which were invalid. The Parliament, therefore, repealed the said Act and enacted the Road Transport Corporations Act, 1950. Section 47 of the said Act validates the Bombay Road Transport Corporation established under the Act of 1948, until a corporation is established under section 3 of the former Act. Steps are now being taken to constitute the Corporation under the said section.

2. The points which are now for consideration are:-

(1) Whether under the Road Transport Corporations Act, 1950, read with the Motor Vehicles Act, 1939, it would be open to the Corporation to take over the road transport services in the several parts

of ....

of the State to the exclusion of other operators. In other words, whether it can have a monopoly to run the road transport service.

(2) Whether in order to enable the Corporation to undertake such road transport service or to have a monopoly for the purpose of running such service, it would be legal to undertake legislation for the purpose.

(3) If any such legislation is undertaken, whether it will be necessary to provide for compensation to the present operators in respect of (a) the termination of their current permits, and (b) the loss of their business in consequence of being disentitled to the renewal of a permit to ply.

7. Before considering these points, it will be necessary to refer to the provisions of the Road Transport Corporations Act, 1950, and the Motor Vehicles Act, 1939, which are relevant. Both under the Government of India Act, 1935, as well as under the present Constitution, "incorporation, regulation and winding up of trading corporations" is a subject on which the Central Legislature can alone enact. It is not a subject under the State List. To enable States to establish Corporations for the purpose of carrying on the business of road transport services, the Central Legislature passed the Road Transport Acts of 1948 and 1950. As is indicated by the preamble, the Road Transport Corporation Act, 1950, has been enacted for the incorporation and regulation of Road Transport Corporations. Section 2(c) of the Act defines "road transport service" as meaning

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a service carrying passengers or goods or both by road in vehicles for hire or reward. Section 3 enables a State Government to establish a road transport corporation having regard to the matters specified in clauses (a) to (c). Section 19 provides for the powers of the Corporation and use of such powers is to operate road transport services. Section 18 provides that the powers are to be exercised progressively to provide, secure or promote the provision of an efficient, adequate, economical and properly co-ordinated system of road transport services. Section 22 states that in carrying on its undertaking the Corporation shall act on business principles. Section 23 relates to the capital of the Corporation, which can be provided for by the Central or State Government or by issue of shares. Section 19(2)(c) empowers the Corporation to acquire either by agreement or compulsorily the whole or any part of any undertaking of any person relating to road transport service. Section 49 provides for compensation for such acquisition. Under section 41 a Corporation established under the Act is a local authority. It is clear from the above provisions that, although the Road Transport Corporations Act, 1950, provides for the acquisition of a transport undertaking by the Corporation, there is no provision for the grant of monopoly or an exclusive right to run a transport service.

4. It is the Motor Vehicles Act, 1939, which contains provisions for the grant of licences or permits to ply motor vehicles. The relevant provisions in regard to this matter are contained in Chapter IV of that Act. Section 42 provides that every owner of a transport vehicles must obtain a permit for the use of the vehicle in a public

public place. Section 43 provides for the power of the State Government to control road transport under sub-section (1). Having regard to the circumstances mentioned in clauses (a) to (d) specified therein, it empowers the State Government to prohibit or restrict the conveying of long distance goods traffic and to fix fix freight charges. Section 44 provides for the constitution of Provincial and Regional Transport Authorities which are entitled to grant permits. Section 47 provides that a Regional Transport Authority in granting or refusing a stage carriage permit has to consider circumstances specified in clauses (a) to (f) of sub-section (1). Section 48 empowers a Regional Transport Authority to restrict the number of stage carriage permits in any particular area. Section 58 relates to the duration and renewal of permits and provides that such permit which is ordinarily known as a regular permit cannot be less than for a period of 3 years and not more than for a period of 5 years. Section 62 provides for the grant of what are known as temporary permits. They are to be granted on certain special occasions. These provisions have been the subject-matter of consideration by courts. In Motilal v. U.P. (I.L.R. (1951) All. 269) the Allahabad High Court held that the above provisions, as they stand, do not provide for the creation of a monopoly in favour of a State Government. It is true that section 43 of the Motor Vehicles Act, 1939, has been amended by Bombay Act VII of 1947. The said Act inserts two more clauses as (iii) and (iv) in sub-section (1) of the said section. Clause (iii) provides that, notwithstanding anything

contained in section 58, the State Government may cancel any permit granted in respect of a transport vehicle; and clause (iv) provides that it may declare that it will engage in the business of road transport service either generally or in any specified area. In the note submitted on behalf of the Road Transport Corporation reliance has been placed in the above clauses. The argument is under the said clauses that it is open to the State Government to terminate the permits granted to private operators and thus enable the Road Transport Corporation to secure a monopoly of running a road transport service. This contention is absolutely wrong and has no substance. In Civil Application No. 631 of 1951 the Bombay High Court, which could take judicial notice of Bombay Act VII of 1947, has observed that the scheme of the Motor Vehicles Act is not to bring about nationalisation nor to create a monopoly in favour of the State. The amendment inserted by Bombay Act VII of 1947 in section 43 of the Motor Vehicles Act was considered by the A.L.A. on more than one occasion, in U.Rs. to H.P. No. 2037 dated 20th February 1948, No. 12305 dated 3rd November 1948 and No. 7066 dated 21th July 1948. As pointed out in these opinions, clauses (iii) and (iv) have been displaced in section 43 by the amending Act and can only be used by the State Government if all the conditions specified in clauses (a) to (d) in sub-section (1) of section 43 are fully complied with. Furthermore, whatever rights may have been conferred by the said clauses on the State Government, these rights cannot be availed of by the Road Transport Corporation constituted under the Act of 1950. It is, therefore, clear that under the provisions of the Motor Vehicles Act, 1939, together with the

amendments made by Bombay Act VII of 1947, it is not possible for the Road Transport Corporation constituted under the Act of 1950 to have a monopoly of the road transport service.

5. The second question for consideration is whether, in order to enable the Road Transport Corporation to have the monopoly of road transport service in the State or any specified area, it would be legal to promote legislation. An objection to the grant of a monopoly may be raised under article 14 which provides for equality and article 19 which provides for liberty to carry on business. Every exclusive privilege is to some extent an infringement upon equal rights and, therefore, ought to be capable of being defended upon some ground that under the circumstances justifies it. Even under the American law it has been held that monopolies are admissible. Obligation to serve the public impartially is held to be an essential ingredient in the grant of a monopoly. Equal protection does not prohibit the granting of special privileges to particular enterprises or employments in the interest of the general welfare. In America the grant of an exclusive right to supply water, a gas light or to lay railway tracks in streets are stated to be the instances of such monopoly (see Cooley's Constitutional Law p. 310). In the exercise of the general Police powers for the protection of the general social interests of its people, the State may validly exclude persons (Willis Constitutional Law, p. 329; Compagnie v. State Board (1902) 186 U.S. 380). In passing the Constitution (First Amendment) Act, 1951, the Parliament has demonstrated that as in America social interest must be preferred to personal liberty or individual's rights (at see Willis' Constitutional Law pp. 503 and 504; see also

article 38 of the Constitution). The decision of the Privy Council in Commonwealth of Australia v. Bank of New South Wales (1950) A.C. 235 does not affect this question. In that case it is no doubt true that section 46 of the Australian Banking Act which prohibited banking by private banks was held invalid as being opposed to free inter state trade guaranteed by section 92 of the Australian Constitution. But the Privy Council observed that it did not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body is justified. Every case must be judged on its own facts and on its own setting of time and circumstances, and it might be that in regard to some economic activities and at some stage of social development, it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable measure of regulation. In Motilal's case referred to above the Allahabad High Court came to the conclusion that it would be legal to grant such monopolies (see per Meetham & Wanchoo JJ, at pp. 330 and 331). Whatever doubt may have been on the subject, such doubt can no longer exist after the passing of the Constitution (First Amendment) Act, 1951. Section 3(6) of that Act, which amends clause (6) of article 19, provides that nothing in sub-clause (f) of article 19 shall affect the operation of any existing law in so far as it relates to or prevent the State from making any law relating to the carrying on by the State, or by a corporation owned or constituted by the State, of any trade, business, industry or service, whether to the exclusion, complete or

partial, of citizens or otherwise. This clause of article 19 has to be read with article 14 and clearly shows that the guarantee of equality afforded by article 14 or liberty to carry on any business or service is limited and will not be a bar to any law creating a monopoly in favour of the State or any corporation owned or controlled by the State. The Road Transport Corporation constituted under the Act of 1950 is a Corporation ~~monopoly~~ constituted by the State and a monopoly to run road transport service can, therefore, be legally created in its favour.

6. The third question for consideration relates to the measure of compensation. This question might arise in two ways. The grant of monopoly to the Road Transport Corporation may have the effect of (1) terminating existing permits granted to private individuals, and (2) barring them from carrying on their business of motor service. It is true that under ~~article~~ article 31(2) of the Constitution no property can be acquired for public purpose without payment of compensation. As pointed out in Motilal's case, the right of highway on public roads includes a right to ply vehicles. But the same case points out that such right can be restricted by such laws as the provisions of the Motor Vehicles Act, 1939. It is not, however, a right or interest in land forming part of the public street Ramachandra by D.B. Ganjam A.I.R. (Orissa) (1951) p. 1 Under section 42 of the Motor Vehicles Act, 1939, no person is entitled to use a transport vehicle in a public place without a permit. Under section 43 the State Government can control the road transport service. It is true that the Road Transport authorities which are empowered to

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grant permits are quasi judicial authorities and cannot act arbitrarily or perversly in the grant, renewal or refusal of permits. But section 58 makes it clear that the period of such regular permit cannot be less than 3 years and not more than 5 years. By Bombay Act VII of 1947, the State Government has been empowered to control that period. It is true that sub-section (2) of section 58 provides that in considering the question of renewal of permits preference has to be given to old operaters over the new, other conditins being equal. But these provisions do not suggest that an operater has an indefeasible right or a right of property in holding a permit perpetually or in obtaining a renewal of an expired permit. Nothing can be the subject of property which is not recognised by law tobe such. And when the law withdraws such recognition, a thing ceases to have the attributes of property. The State has the right to define the kinds of property and the character of the interest therein to which it will give legal recognition (Cooley's Constitutional law p. 392). Thus in Mugler v. Kansas (1887) 123 U.S. 623 it was held that on the passing of a law prohibiting the manufacture and sale of intoxicating liquors, the owners of a factory are not entitled to compensation (see also [redacted] v. McCurdy 267 U.S. 192). Similar view has been taken in several of the American decisions on Police powers referred to in Motilal's case. It would, therefore, be reasonable to hold that -

(a) if a permit is affected or terminated during the period of its currency or validity, the holder will be entitled

to compensation for the loss of profits for the unexpired period; but not altogether for the loss of the business/~~altogether~~

(b) the holder of a permit the period of which has expired under section 58 of the Motor Vehicles Act, 1939, will not be entitled to any compensation on the ground of the loss of business, in consequence of the fact that his permit could not be renewed owing to the grant of a monopoly in favour of the Road Transport Corporation.

7. As it is necessary for Government to take decision on this matter without any delay, the Advocate General is requested to give his opinion at a very early date.

Sd/- V.R.Dhurandhar.
7.3

Additional Secretary to Government.

U.O. to Advocate General, No. 243-Genfl., dated 7th March 1952.

V.M.D./24.7
&c.

No. 4 of 1952.

Advocate General's Chambers,
High Court,
Bombay, 17th March, 1952.

U.R. TO ADVOCATE GENERAL, NO. 248-
Confl: DATED 7th MARCH, 1952.

The first point for consideration is whether under the Road Transport Corporation Act of 1950 read with Motor Vehicles Act of 1939, it would be open to the Corporation to take over Road Transport Services in the several parts of the State to the exclusion of other operators. In other words whether it can have monopoly to run Road Transport Service.

Sec. 19(2)(c) of the Road Transport Act authorises the corporation to acquire either by agreement or compulsorily, whether absolutely or for any period, the whole or any part of any undertaking of any person to the extent to which the activities thereof consist of the operation of Road Transport Service in the State. There is no provision, however in the Act for granting a monopoly or an exclusive right to run transport service to the corporation. Similarly under the Motor Vehicles Act also as held by a Full Bench of the Allahabad High Court in Motilal vs. U.P. (A.I.R.1951 All. 257) there is no provision for creation of a monopoly in favour of the State Corporation. A similar view is incidentally taken by the Bombay High Court in Civil Application No. 631 of 1951. In this case the Bombay High Court has observed that the scheme under the Motor Vehicles Act, 1939, is not to bring about the --nationalisation or to create a monopoly in favour of the State. In my opinion, therefore, under the Road Transport Corporation Act, 1950, read with the Motor Vehicles Act, 1939, it would not be open to the corporation to have a monopoly to run Road Transport Service.

The second question for consideration is whether, to enable the corporation to have a monopoly for the purpose of running Road - Transport Service, it would be legal to under-take legislation for the purpose. In this connection it is necessary to consider the effect of articles 14 & 19 of the Constitution of India. In the granting of a

monopoly ....

monopoly, the obligation to serve the public impartially is always an essential ingredient. The equal protection clause does not prohibit the granting of special privileges to particular enterprises in the interests of general public welfare. In America in spite of equal protection clause, monopolies have been created by granting exclusive right to supply water or gaslight or to allow railway track in streets. I think that the legislation granting such monopoly to the corporation will not be hit by article 14 of the Constitution. Article 19(6) is amended by the Constitution - First Amendment Act of 1951. By this article, as amended, it is, inter alia provided that nothing in article 19(1)(g) of the Constitution shall prevent the State from making any law relating to the carrying on by the State or by the Corporation owned or controlled by the State of any trade or business or service whether to the exclusion, complete or partial, of citizens or otherwise. After this amendment, in my opinion, there will be no bar to any law creating a monopoly in favour of the State Transport Corporation.

Lastly, as regards the question of compensation it will be - proper to provide for compensation to the present operators in respect of the termination of their current permits. Such operators will not be - entitled to any compensation for loss of their business in consequence of being disentitled to the renewal of the permit to ply. There is no inherent right in the present operators to have renewal permit and it is - extremely doubtful whether it can be considered property under article 31(2) of the Constitution. Further when the law provides for creating a monopoly in favour of the corporation it cannot be said that the property, if any, of the present operators is acquired or taken possession of. In my opinion the present operators are not entitled to any compensation on the ground of loss of business in consequence of the fact that their permits could not be renewed owing to the grant of monopoly in favour of the Road Transport Corporation.

Sd/-

ADVOCATE GENERAL OF BOMBAY.

V.M.D./25.7
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LEGAL DEPARTMENT.

Copies of the Statement of the Case referred to the Advocate General and of his opinion No. 4 dated 17th March 1952 are sent herewith.

Sd/-

Additional Secretary to Government.

U.R. to H.D. No. 271-Confl., dated the 18th March 1952.

Copy to the Secretary, Bombay State Road Transport Corporation with reference to his letter No. ST/587/5/SCR/447, dated 1st March 1952.

V.H.D./25.7

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